United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

To Be Argued By
GARY P. NAFTALIS

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UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

75-1077

UNITED STATES OF AMERICA,

Appellee,

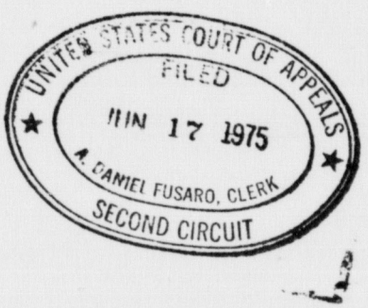
- against -

WILSON TORRES,

Defendant-Appellant.

ON APPEAL FROM A JUDGMENT OF THE
UNITED STATES DISTRICT COURT FOR
THE SOUTHERN DISTRICT OF NEW YORK

REPLY BRIEF FOR APPELLANT



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REPLY BRIEF FOR APPELLANT

POINT I

REVERSIBLE ERROR WAS COMMITTED BY THE GOVERNMENT'S INTRODUCTION OF GUZMAN'S TESTIMONY AT TORRES' FIRST TRIAL

As this Court recognized in reversing Torres' conviction the first time, the credibility of police officer Guzman was the key issue at trial. United States v. Torres, 503 F.2d 1120, 1126-7 (2d Cir. 1974). As in Torres' first trial, the thrust of defense counsel's cross-examination of Guzman was to establish that he omitted from his contemporaneous report of investigation and from his testimony in a prior trial in 1972 of co-defendant Jesus Sanjurjo, certain inculpatory conversations that he only claimed had occurred when he testified against Torres. This cross-examination

was designed to serve as the basis for arguing to the jury that since Guzman had only thought of these conversations when he had to testify against Torres, they did not happen. And defense counsel so argued to the jury (Tr. 157-8; 160-1). As we pointed out in our main brief, the Government improperly blunted the effectiveness of this cross-examination by reading into evidence Guzman's testimony about one of these conversations at the first Torres trial a year earlier ("Torres I") -- which was consistent with Guzman's testimony at Torres' second trial ("Torres II"). Moreover, the Government counsel misled the jury by telling them that defense counsel had questioned Guzman about his testimony at Torres' first trial regarding this conversation (Tr. 74) -- something which simply had never occurred. Hence, the Government derived an unfair advantage from the reversal of Torres' first conviction -- the bolstering of Guzman's credibility at this trial by showing that he had testified consistently in an earlier trial of Torres.* It is clear that it would be fundamentally

*The Government attempts to minimize the significance of this conversation by claiming that in Torres I, this Court held that "the proof wholly apart from this conversation overwhelmingly established" Torres' guilt (Government's brief, P. 6, F.N.). Nowhere in Torres I does this Court make such a finding. This Court merely held that all the evidence, including this important conversation was sufficient to establish Torres' guilt. Indeed, all of Guzman's conversations with Torres total no more than from two to five minutes (Tr. 59). The Government also ignores the fact that this short, simple case "turned almost completely on the credibility of Guzman's testimony," United States v. Torres, supra, 503 F.2d at 1126-27.

unfair if the Goverment could benefit from its error in Torres I by using that testimony as a prior consistent statement in Torres II and secure a conviction it would not otherwise have obtained.

The Government attempts to evade the force of this argument by claiming, for the first time on appeal, that Guzman's testimony at Torres I was actually offered to correct an inaccurate impression left by two of defense counsel's questions on cross-examination. This argument, which was never made below, is based on an extraordinarily misleading presentation of the record and is disingenuous in the extreme. Moreover, the Government's brief fails to deal with the fundamental issue raised by appellant Torres: that the Government, whose errors caused a reversal of Torres' conviction and hence a need for a second trial, should not derive an advantage from this conduct by using the testimony offered at trial I to render more believable the very same testimony given at trial II.

The Government's claimed justification for its conduct stems first from the premise that "defense counsel first brought out that Guzman had testified at an earlier trial of Torres." (Government's brief, P. 9)

This statement is simply untrue. The plain truth is that at no time did defense counsel ever bring out that Guzman had testified at an earlier trial of Torres. Nor would any experienced defense counsel wish to call to the jury's attention that his client had been the subject of a prior criminal trial -- a fact which could only serve to prejudice the defendant in the jury's eyes. Thus, on the two brief occasions in which defense counsel used the transcript of Torres' first trial to impeach Guzman's testimony, he referred to the transcript merely as being that of "a prior proceeding in this matter." (Tr. 61), and that of "an earlier proceeding a short while ago in this same case." (Tr. 62). Indeed, defense counsel described Torres I in such a manner so the jury would not draw the conclusion (prejudicial to the defendant) that Torres had been the subject of a prior criminal jury trial. Hence, for the Government to claim that defense counsel brought out that this was Torres' second trial is simply contrary to the record.

The second premise in the Government's argument is that two of defense counsel's questions on cross-examination gave the jury the impression "that Guzman had thought up the conversation since Torres' last trial." (Government's brief, P. 10). Of course, as just noted,

defense counsel had never told the jury that there had been a first Torres trial, so no such implication would be drawn. Nor did defense counsel ever make any such argument to the jury. Rather, the thrust of defense counsel's cross-examination and summation was to show that it was not until Torres went to trial that Guzman "recalled" certain conversations that he had not related in his report or in his testimony at the earlier trial of the co-defendant Jesus Sanjurjo. The relevant part of Guzman's cross-examination is as follows:

> "Q. Now, isn't it a fact, sir, that nowhere in your report, which is Exhibit 3502, for identification, did you ever mention that this gentleman, Wilson Torres, ever said to you at any time anything about protecting any connection?
>
> A. It's not included in that report, no, sir.
>
> Q. As a matter of fact in your report you say somebody else said that, didn't you?
>
> A. At one time, yes, sir.
>
> Q. You say the lady named Lillian you say said that?
>
> A. Yes, sir.
>
> Q. By the way, when you were in an earlier proceeding a short while ago in this same case, when you were asked the same question, didn't you deny under oath the fact that Mr. Torres' name was not in the report relating to that conversation?
>
> A. Would you repeat the question again, please?

Q. Do you recall being asked this question and giving this answer, page 75:

'Q. Isn't it a fact, sir, that in your report you pointed out this conversation about which you have just testified involving connections only took place with Lillian and Mr. Torres was not present; isn't that a fact?

A. No, sir.'

Do you recall being asked that question and giving that answer?

A. Yes, sir.

Q. And you just indicated that's not accurate because the report only refers to Lillian, is that correct?

A. Yes, sir.

Q. Not Mr. Torres.

A. Yes, sir.

* * *

Q. Now, Mr. Guzman, you also indicated on your examination here something to the effect that you told Mr. Torres or Lillian or whoever was in your car something about, 'That's not the way I do business, I'm not going to get burned,' or something to that effect, is that correct?

A. Yes, sir.

Q. And I take it, is that conversation recounted anywhere in your report?

A. I don't remember.

Q. Look at 3502 for identification. See if you can refresh your recollection and see if it's contained anywhere in there.

A. No, sir.

Q. Now, Mr. Guzman, later in 1972, you gave testimony, did you not, against somebody else involved in this case [Jesus Sanjurjo], is that correct?

A. Yes, sir.

Q. And do you recall in that testimony the fact that you again did not refer to this conversation which you have only testified about today?

A. Yes, sir.

Q. You left it out then also?

A. Yes, sir.

Q. By the way, before you came here to testify today, I take it you read and examined this report of yours, didn't you?

A. Yes, sir.

Q. You studied it in preparation for your testimony?

A. Yes, sir.

Q. And you also studied the prior testimony you gave on other occasions, did you not?

A. Yes, sir.

Q. And you discussed your past testimony and your present testimony here with Mr. Cutner, didn't you?

A. Yes, sir.

Q. And you discussed it in the past, have you not, with other Assistant United States Attorneys?

A. Yes, sir.

Q. And one of the things you discussed with Mr. Cutner was the problem about things that you omitted in your past reports and testimony, isn't it?

A. Yes, sir.

Q. And that you would be confronted with the fact that you had failed to include things in your report that you now for the first time say happened; is that right?

A. I wouldn't say -- I would have to say yes and no to that.

Q. But that was something that was discussed?

A. Yes, sir.

Q. And another thing that Mr. Cutner prepared you for was the fact that you were to be questioned on the fact that when you testified under oath against someone else involved in this case [Jesus Sanjurjo] you didn't mention certain conversations which you now say happened; is that correct?

A. Yes, sir." (Tr. 62-66)

To be sure, in two of the questions asked Guzman there are phrases that might indicate that Guzman had first mentioned this conversation in Torres II. While these two questions might have been more artistically phrased, the context of the entire questioning makes it abundantly clear that the cross-examiner's point was that it was not until Guzman testified against Torres that he remembered conversations which were absent from his report and testimony in the trial of co-defendant Sanjurjo -- a fact which is undisputed. Indeed, as a practical matter, Torres I has no independent significance in light of the reversal and the second trial is nothing more than an extension of the first trial. The signifi-

cant fact is what Guzman said about the events in question before Torres' prosecution, as compared to what he said in Torres' prosecution.

That no misleading implication was conveyed by defense counsel's questioning is best evidenced by the fact that the Government never objected to it nor made any other complaint. Had these two isolated questions actually been misleading, surely the Government would have objected and thus defense counsel could have rephrased the question. Alternatively, the Government could have sought a stipulation from defense counsel not to make any such argument to the jury (which would clearly have been given, since no such argument was ever made by defense counsel). Nor did the Government ever claim in the trial court that the purpose of its redirect examination was to correct such alleged misimpressions. The record plainly indicates what was the Government counsel's true purpose in offering Guzman's testimony at Torres I.

Redirect by the Government

"Q. Mr. Guzman, you were asked by Mr. Naftalis about your testimony in a proceeding about a year ago. Correct?

A. Yes, sir.

Q. And he asked you whether or not you included in that testimony your conversation with Wilson Torres in the car while you were driving from 100th Street and 1st Avenue to 120th and 2nd Avenue.

MR. NAFTALIS: Your Honor, I object to that as a misstatement. That was a reference to the '72 transcript [the Jesus Sanjurjo trial], your Honor.

THE COURT: All right, I will sustain the objection as to form. Just go ahead and ask him a question. Don't attempt to describe or characterize what Mr. Naftalis asked him. Just read it in the terms of the prior proceeding.

Q. Were you asked these questions and did you give these answers;" (Tr. 74) (Emphasis added.)

It is undisputed that defense counsel had never asked Guzman whether he had included this conversation in his testimony in Torres I. Yet that is what Government counsel told the jury. Thus, the redirect examination was hardly designed to correct the imagined wrong on cross-examination on which the Government now relies. Rather, the effect of the prosecutor's redirect examination was to mislead the jury in two material respects: (1) that defense counsel had in fact cross-examined Guzman about his testimony regarding this conversation in a 1974 trial [Torres I] when actually Guzman had been cross-examined about his testimony in the 1972 Jesus Sanjurjo trial; and (2) that defense counsel had intentionally omitted the consistent part of Guzman's response at that trial and there was actually no inconsistency between Guzman's trial testimony and the prior testimony he had given.

Thus, rather than correcting defense counsel's cross-examination, the Government's redirect examination actually misled the jury and further exacerbated the prejudice to Torres. See Giglio v. United States, 405 U.S. 150, 153 (1972); United States v. Seijo, Dkt. Nos. 74-2313, 74-2346, Slip Op. at 3039 (2d Cir. April 23, 1975).

Hence, the rule of United States v. Sherman, 171 F.2d 619 (2d Cir. 1948), cert. denied, 337 U.S. 931 (1949), and its progeny precluding the use of prior consistent statements that do not antedate the witnesses' motive to fabricate mandates reversal. Nor is this rule inapplicable because Guzman's prior consistent statement was sworn to and subject to cross-examination as the Government asserts (Government's brief, P. 10). This was no ordinary prior consistent statement. This was Guzman's testimony at Torres' first trial; and the second trial was only necessary because of the Government's errors at the first trial. Under these circumstances, it would be anomolous if the Government could benefit from the reversal and improve its case by utilizing the consistent testimony given at the first trial to render more believable the very same testimony given at the retrial. No case or other authority cited by the Government establishes such a rule which rewards the Government for its mistakes at the expense

of the successful appellant. For if that be the rule and this case is reversed again, and Torres tried a third time, the Government could offer Guzman's testimony at the first two trials.

POINT II

THE JURY WAS MISLED REGARDING GUZMAN'S TESTIMONY AT THE PRIOR TRIAL OF CO-DEFENDANT JESUS SANJURJO

Cross-examination of Guzman established that in his testimony at the 1972 trial of the co-defendant Jesus Sanjurjo, he had omitted an important inculpatory conversation which he now claimed he had with Torres. To counter this attack on Guzman's credibility, the Government in its redirect and summation misled the jury into believing that Guzman had not been asked in the Jesus Sanjurjo trial to recount his conversations with Torres. In fact, at the Sanjurjo trial, Guzman had been asked to recount all of the events on the night in question. Moreover, as we pointed out in our main brief, this redirect and summation was a repetition of what the Government had done in Torres I and this Court had indicated that such examination was not wholly accurate. United States v. Torres, supra, 503 F.2d at 1126-27. Thus, the Government was on explicit notice not to do it again.

The Government claims that the "jury could not have been misled" because defense counsel in his cross and recross examination and in summation "pointed out the inconsistency between Guzman's testimony at the two trials." (Government's brief, P. 21). That argument misses the point. It is not the defendant's obligation to correct misleading testimony

which was elicited by the prosecution from its own witness in an effort to blunt the effect of cross-examination. The Government is obligated to present truthful testimony and to correct its witnesses' testimony if not accurate. See Giglio v. United States, supra, 405 U.S. at 153; Napue v. Illinois, 360 U.S. 264, 269 (1959); United States v. Seijo, Dkt. Nos. 74-2313, 74-2436, Slip Op. at 3039 (2d Cir. April 23, 1975); Alcorta v. Texas, 355 U.S. 28 (1967). This inaccurate testimony not only was not corrected, but was utilized by the prosecutor in summation to explain away inconsistencies between Guzman's testimony at the Sanjurjo trial and in the instant case (Tr. 180-1).

The Government also asserts that this Court in reversing Torres' conviction did not suggest that this questioning was improper (Government's brief, P. 22). On the contrary, this Court's opinion in Torres I hardly sanctions the prosecutor's questioning. The Court's opinion reads as follows:

> "On cross-examination of Guzman it was established that inculpatory conversations Guzman claimed he had with Torres or in his presence were neither in his report of investigation made two days after February 14 nor mentioned in his testimony at a prior trial of codefendant Jesus Sanjurjo. The conversations in question included the response to his complaint to Torres and Lillian Ortiz that he was annoyed over driving up and down between

> 100th Street and 120th Street to pick up the February 14 heroin since he was fearful of 'getting burned' or that his car was going to get 'burned.' Guzman testified at Torres' trial that either Lillian or Torres replied that 'The connection had to take care of himself because this was no little package.' On redirect the prosecutor asked Guzman whether he had been asked at the trial of Jesus Sanjurjo about the conversation with Torres, and he replied that he had not, and that he had testified to conversations with Jesus Sanjurjo at Jesus' trial which conversations he had not recounted in detail at the trial below. In fact, the transcript of the Jesus Sanjurjo trial shows that agent Guzman testified in detail regarding the events of February 14, 1972, and those details were the very same, and included the same conversations, that he had testified to at the Torres trial with the exception of the single 'burning' conversation with Torres (or in his presence). Thus the implication of Guzman's testimony was that there were other conversations with Jesus Sanjurjo not testified to at the Torres trial was not wholly accurate." (Emphasis added.) (503 F.2d at 1126-27)

The Government also argues that Torres has waived this claim by not objecting below. This is not entirely accurate. While no objection was made to the question on redirect, defense counsel made a specific objection to the prosecutor's improper argument in summation (Tr. 180-1), thereby preserving this issue for appeal. Moreover, this point had been the subject of Torres' first appeal and thus the Government was well aware of the problem and yet consciously went ahead. Under these circumstances, it ill

behooves the Government to claim waiver.

Finally, the Government argues that its misleading redirect and summation was not unduly prejudicial by allegedly comparing Guzman's version at the Sanjurjo trial and at Torres II (Government's brief, P. 11, F.N., P. 21, F.N.).* However, the Government's quotation leaves out a portion of the Sanjurjo testimony which emphasizes the conflict between Guzman's testimony at the two trials. Thus, in the Sanjurjo trial, Guzman testified as follows:

> "Q. Tell us what you did.
>
> A. Once I parked on 100th Street and First Avenue I was approached by Wilson Torres who then instructed me to drive to 120th Street and First Avenue. While I was driving Lillian told me that the connection had to be careful, that I wasn't being followed.
>
> As we arrived at 120th Street and First Avenue Lillian and Wilson Torres left my car and proceeded east on 120th Street.
>
> Q. Did you remain in your car now that you are at 120th Street?
>
> A. Yes, sir.
>
> Q. Tell us what happened at approximately 11:00 o'clock.
>
> A. Subsequently, Lillian returned to the car and stated that I would get the package at 96th Street and Second Avenue. While I

*A similar argument was unsuccessfully urged by the Government in the appeal from Torres I.

was driving down to 96th Street and Second Avenue I again observed the white car following my car, and while I was driving Lillian stated that Jesus Sanjurjo, the defendant, had to be careful because it was a large amount." (Emphasis added.) (United States v. Sanjurjo, Tr. Gob. 10-11)

Whereas, in Torres, Guzman testified as follows:

"And as I was driving to 120th Street and 1st Avenue, I was told either by Wilson Torres or Lillian that the connection had to be careful because it was a small package, it was an eighth of a kilo, and they wanted to make sure that nothing would happen, and that Jesus Sanjurjo would be following me in the white car.

I then told them that that is not the way that I do business, driving from one place to the other, and that that way, myself and my car get hot, and I could be either taken off or arrested by the police.

As we arrived at 120th Street and 1st Avenue, Lillian and Wilson Torres left the car and stated that they'd be back shortly (Tr. 44-45)." (Emphasis added.)

Thus, the inconsistency was much sharper than the Government concedes. Moreover, it was of critical importance in a short case which turned, as this Court recognized, "almost entirely on the credibility of Guzman's testimony," United States v. Torres, 503 F.2d at 1126-27, and where the central focus of defense counsel's cross-examination had been Guzman's failure to relate in his report and at the Sanjurjo trial conversations he now claimed he had with Torres.

CONCLUSION

Appellant Torres was denied a fair trial and his conviction must be reversed and a new trial ordered.

Dated: New York, New York
June 17, 1975

Respectfully submitted,

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